FILED
APR 11 2003
OFFICE OF THE CLERK

No. 02-1322

In The

Supreme Court of the United States

STEPHEN PERITZ,

Petitioner,

vs.

PAINEWEBBER INCORPORATED,
A Delaware Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

FRANK C. MORRIS, JR.
Counsel of Record
ANDREA R. CALEM
EPSTEIN BECKER & GREEN, P.C.
1227 25TH STREET, N.W.
SUITE 700
WASHINGTON, D.C. 20037
(202) 861-1880
Attorneys for Respondent
PaineWebber Incorporated

19 pp

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review an attorney's fees award reducing the lodestar figure by 25% because of petitioner's limited success in terms of the nature and scope of the relief obtained, when that decision rested on the trial court's detailed factual findings, which properly stated and followed the rules of law set forth in this Court's decisions, and was consistent with the reasoning and approach to lodestar reduction in other circuits?

PARTIES BELOW AND PARENT COMPANIES

The Petition states the names of the parties as they have been identified throughout this litigation. In November 2000, PaineWebber Group Inc., the parent of PaineWebber Incorporated, was acquired by UBS AG. Thereafter, in March 2001, PaineWebber Incorporated became known as UBS PaineWebber Inc. UBS PaineWebber Inc. is wholly owned by UBS Americas Inc., which in turn is wholly owned by UBS AG, a publicly traded company.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW i

PARTIES BELOW AND PARENT COMPANIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Procedural Background 5

REASONS FOR DENYING THE WRIT OF CERTIORARI 6

A. Petitioner's Disagreement With The Eleventh Circuit's Application Of *Hensley v. Eckerhart* Does Not Establish Legitimate Grounds for Granting Certiorari In This Case 6

B. Petitioner's Misinterpretation of *Hensley v. Eckerhart* Underlies This Petition 6

C. The Decisions Below Are Consistent with *Hensley v. Eckerhart* 8

D. The Decisions Below Are Consistent With Those of Other Circuits 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Page

Braxton v. United States, 500 U.S. 344 (1991) 6

Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978) 9

Coutin v. Young & Rubicam, 124 F.3d 331 (1st Cir. 1997) 10

Culebras Ent. Corp. v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988) 11

Dillard v. City of Greensboro, 213 F.3d 1347 (11th Cir. 2000) 8

Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987) 11, 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4, 6, 7, 8, 9

Nephew v. City of Aurora, 766 F.2d 1464 (10th Cir. 1985) 11

Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988) 9, 10

Perkins v. Mobile Housing Board, 847 F.2d 735 (11th Cir. 1988) 8

Popham v. City of Kennesaw, 820 F.2d 1570 (11th Cir. 1987) 9

Sanders v. Brewer, 972 F.2d 920 (8th Cir. 1992) 11

Spanish Action Committee Of Chicago v. City of Chicago, 811 F.2d 1129 (7th Cir. 1987) 11

Villano v. City of Boynton Beach, 254 F.3d 1302 (11th Cir. 2001) 8

Volk v. Gonzalez, 262 F.3d 528 (5th Cir. 2001) 11

Watt v. Alaska, 451 U.S. 259 (1981) 6

Zook v. Brown, 865 F.2d 887 (7th Cir. 1989) 11

STATUTES

18 U.S.C. §§ 1962(b) and 1962(c) 3

18 U.S.C. § 1964(c) 3

28 U.S.C. § 1254 (1) 2

42 U.S.C. § 12101, *et seq* 2, 3

Fla. Stat. § 772.103(2) 3

Fla. Stat. § 772.106 3

No. 02-1322

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN PERITZ,

Petitioner,

vs.

PAINEWEBBER INCORPORATED,
A Delaware Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent PaineWebber Incorporated, now known as UBS PaineWebber Inc., ("PaineWebber") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The per curiam opinion of the Eleventh Circuit is unreported and is contained in the Appendix to the Petition ("Pet. App.") at 1-8. The Order of the United States District Court for the Southern District of Florida affirming the Magistrate Judge's report and recommendations on the award of attorney's fees and costs is contained in Pet. App. 9-10. The report and recommendations of the Magistrate Judge on the award of attorney's fees and costs is unreported and is contained in Pet. App. 13-27.

JURISDICTION

Jurisdiction in the first instance was conferred on the United States District Court for the Southern District of Florida pursuant to the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* That Court entered a final judgment on April 30, 2002. The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 16, 2002. A petition for rehearing and rehearing *en banc* was denied by order dated January 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Petition accurately sets forth the pertinent statutory provisions.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Stephen Peritz ("Petitioner"), formerly a stockbroker employed by Respondent PaineWebber

Incorporated, now known as UBS PaineWebber Inc., ("PaineWebber") sought relief in the United States District Court for the Southern District of Florida for alleged discrimination based on a disability (a herniated disc) and failure to accommodate his request to work at home. Petitioner requested the full panoply of relief available under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), including reinstatement, compensatory damages, back pay, front pay and punitive damages, "all in excess of $2,000,000.00." (Pet. App. 2, Pet. 4.)

On May 25, 2000, Petitioner filed an amended complaint adding two counts under federal RICO, 18 U.S.C. § 1964(c), for violation of 18 U.S.C. §§ 1962(b) and 1962(c), one count under Florida RICO, Fla. Stat. § 772.106, for violation of Fla. Stat. § 772.103(2), and one count of fraud. At the end of August 2000, the parties stipulated that the RICO and fraud claims would be submitted to arbitration, limiting trial to the ADA action. Notwithstanding this stipulation, the litigation became, in the words of the Magistrate Judge who presided over both discovery disputes and the attorney's fee motion, "protracted." (Pet. App. 13.) The parties became embroiled in extensive discovery and other disputes about issues of alleged fraud on PaineWebber's part, a number of which appeared to relate more to the RICO and fraud claims than to the ADA claim.

After trial, the jury awarded Petitioner back pay in the amount of $917,000. Petitioner had withdrawn his request for compensatory damages. (Pet. App. 18.) The District Court ruled that, based on the evidence adduced, Petitioner's request for punitive damages would not be submitted to the jury. (Pet. App. 2.) At trial, significant time and testimony was devoted to evidence concerning Petitioner's failure to mitigate his damages, which impacted

on the issue of front pay. Ultimately, the District Court ruled that Petitioner was not entitled to any front pay based on his failure reasonably to mitigate his damages. (Pet. App. 2, 18.) Petitioner unsuccessfully cross-appealed the District Court's rulings barring punitive damages and front pay.

Following trial, Petitioner filed a Motion for Attorney's Fees and to Tax Costs, which is the subject of the Magistrate Judge's Report and Recommendation (Pet. App. 13-27). Using the lodestar method, and following the principles enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Magistrate Judge reduced the lodestar amount by 25% and awarded Petitioner's attorney's fees in the amount of $471,296.85. He noted that Petitioner had not responded to PaineWebber's contention that lodestar reduction was appropriate in light of Petitioner's unsuccessful claims for front pay, reinstatement, compensatory damages and punitive damages. In this context, the Magistrate Judge also referred to Petitioner's history of ignoring the merits of the ADA case in favor of other issues: "One of the problems herein is that plaintiff's focus has frequently been more in the "sanctions" arena than in the "merits" arena." (Pet. App. 18.) Over objections from both parties, the District Judge affirmed the Magistrate Judge's recommendation, saying the latter had made an "appropriate downward adjustment" of fees and costs, citing as a reason for the amount of attorney's fees the "extensive, contentious" nature of the litigation. (Pet. App. 9.)

Addressing cross-appeals of the attorney's fee issues, the Court of Appeals for the Eleventh Circuit found no abuse of discretion in the lodestar reduction, noting that this Court's *Hensley* decision authorizes fee reductions in cases where a plaintiff has "achieved only partial or limited success" (Pet. App. 6). The Appellate Court cited prior

Eleventh Circuit precedent in which "partial or limited success" was measured by comparing the nature and extent of the relief sought to that which was obtained, and affirmed the District Court's lodestar reduction of 25%. (Pet. App. 6-7.)*

B. Procedural Background

Petitioner filed a Motion for Attorney's Fees and to Tax Costs on July 12, 2001. The Magistrate Judge's Report and Recommendation for disposition of that motion was filed on March 29, 2002. (Pet. App. 13.) The District Judge's Order Affirming the Magistrate Judge's Report and Recommendations was entered on April 30, 2002. (Pet. App. 9-10.) Both parties appealed this Order, and the *per curiam* decision of the Eleventh Circuit Court of Appeals on the attorney's fee issues was entered on October 16, 2002. (Pet. App. 1-8.) Petitioner's Petitions for Rehearing and Rehearing En Banc were denied by order dated January 29, 2003. (Pet. App. 11-12.)

* The Eleventh Circuit did remand in part to the District Court to address a small computational issue. (Pet. App. 8.)

REASONS FOR DENYING THE WRIT OF CERTIORARI

A. Petitioner's Disagreement With The Eleventh Circuit's Application Of *Hensley v. Eckerhart* Does Not Establish Legitimate Grounds for Granting Certiorari In This Case.

Petitioner has brought to this Court his simple disagreement on the facts presented with the relief-oriented approach used by the Eleventh Circuit (and others) to assess the propriety of a lodestar reduction when making an award of attorney's fees. The decisions below correctly state the law as set forth in the seminal case of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and apply that law to the facts of this case in a straightforward and well-accepted manner. The "principal purpose" for this Court's exercise of its certiorari jurisdiction is to "resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). *See also*, *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) (the Court's "certiorari jurisdiction is designed to serve broader purposes than the correction of error in particular cases"). Petitioner has not shown the need for the exercise of this Court's certiorari jurisdiction.

B. Petitioner's Misinterpretation of *Hensley v. Eckerhart* Underlies This Petition.

At the heart of this Petition is Petitioner's misstatement or misunderstanding of well-established law. Petitioner unilaterally concludes that his recovery in this case – limited to back pay -- constituted an "excellent result" as that term is used in *Hensley v. Eckerhart*, 461 U.S. at 435, and therefore could not have constituted "partial or limited

success" as a matter of law. On that basis, he contends it was error to deny him a "fully compensatory fee." Petitioner's unduly narrow reading of the *Hensley* case results in this erroneous legal conclusion.

The discussion in *Hensley* of the "excellent result" that normally warrants "a fully compensatory fee" is given fuller meaning by the very next section of the decision. There, this Court contrasts the "excellent result" scenario with the "partial or limited success" that might render the lodestar amount excessive, "even where the plaintiff's claims were interrelated, non-frivolous and raised in good faith." 461 U.S. at 436-37. The "most critical factor" in deciding whether the lodestar is excessive is "the degree of success obtained." Id. Recognizing that "[t]here is no precise rule or formula for making these determinations," and "the range of possible success is vast," id., this Court in *Hensley* did not attempt to define with specificity the phrases "excellent result" or "degree of success." Rather, it left such "equitable judgment" to the district court's discretion, to be "exercised in light of the considerations we have identified." Id. "This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." Id. at 437 (emphasis added). The wisdom of that observation is well illustrated by the Petition. Overall, the district court's inquiry must focus on "the relationship between the amount of the fee awarded and the results obtained." Id.

Thus, Petitioner would focus exclusively on the significance of his back pay recovery, despite the fact that this Court has held that a reduced fee award "is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440. Under

Hensley, Petitioner's back pay recovery cannot be defined as "excellent" as a matter of law in light of the scope of the litigation as a whole. Ibid.

C. The Decisions Below Are Consistent with *Hensley v. Eckerhart.*

While it is improper to reduce fees based on a ratio of successful issues to issues raised, *Hensley*, 461 U.S. at 435 n. 11, this Court has not ordained a single correct method for evaluating the relationship between the fee awarded and the "results obtained," or the relief obtained in the context of the "scope of the litigation as a whole." The significance of the relief obtained in any particular case necessarily is fact and context-specific. In the decisions below, the courts compared the nature and scope of the relief Petitioner requested – in excess of two million dollars in back pay, front pay, compensatory damages, punitive damages, and reinstatement – with the single category of relief he received – back pay. In neither decision did the court use a mathematical formula or ratio, as Petitioner incorrectly suggests. Had they done so, Petitioner undoubtedly would have received a much reduced fee. Rather, both courts relied on a line of Eleventh Circuit authority following *Hensley's* comparative approach. *See Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001) (remanding for determination of whether plaintiff had obtained excellent results, to be determined in part by considering amount of damages and whether plaintiff achieved full measure of success sought); *Dillard v. City of Greensboro*, 213 F.3d 1347 (11th Cir. 2000) (lodestar adjustment appropriate in Voting Rights Act suit based on limited effectiveness of plaintiff's work); *Perkins v. Mobile Housing Board*, 847 F.2d 735 (11th Cir. 1988) (15% lodestar reduction appropriate where prevailing parties accomplished central

objective of suit but did not obtain all relief sought); *Norman v. Housing Authority City of Montgomery*, 836 F.2d 1292, 1298-1302 (11th Cir. 1988) (tracing evolution of Supreme Court decisions and corresponding Eleventh Circuit authority on this issue); *Popham v. City of Kennesaw*, 820 F. 2d 1570 (11th Cir. 1987) (reducing lodestar 67% where plaintiff sought $2 million in compensatory and punitive damages but obtained $30,000 on one claim of use of excessive force).

Such an approach is entirely consistent with *Hensley*, in which this Court underscored the significance of the "results obtained" factor in a footnoted discussion of *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978). 461 U.S. 438, n.14. The plaintiff in *Brown* had sought reinstatement, lost wages, $25,000 in damages, and expungement of material from her employment record. She obtained lost wages and the expungement, but not the other elements of relief. The District Court declined to award attorney's fees for hours spent on issues as to which relief had not been granted. The Eighth Circuit reversed, minimizing the significance of the "results obtained" factor. This Court took issue with the Eighth Circuit's *Brown* decision, which "understates the significance of the results obtained," and held it "certainly was well within the *Brown* District Court's discretion to make a limited fee award in light of the 'minor' relief obtained." Id.

The decisions below are consistent with this Court's *Hensley* decision in another respect as well. Based on its close involvement with and "superior understanding of the litigation," *Hensley*, 461 U.S. at 437, the District Court's discussion of lodestar reduction referred to Petitioner's attempts to draw fraud and other unrelated issues into the case, suggesting this complicated and expanded the scope of

the litigation. (Pet. App. 18.) These considerations, tied to the court's overall comparison of the relief obtained and the scope of the litigation as a whole, are precisely the types of fact-based "equitable judgments" the *Hensley* decision pointedly leaves to the trial court's discretion.

D. The Decisions Below Are Consistent With Those of Other Circuits.

Petitioner incorrectly argues the existence of a conflict between the decisions below and the First Circuit's decision in *Coutin v. Young & Rubicam*, 124 F.3d 331 (1st Cir. 1997), on the grounds that the latter decision holds that courts may not base a fee reduction on a ratio of damages requested to judgment received. Contrary to Petitioner's erroneous factual contention, however, the decisions below made no such mathematical calculations. Moreover, the *Coutin* decision actually is consistent with the decisions below; it recognizes that a plaintiff may prevail on all claims, "but receive limited (though not insubstantial) redress. In such circumstances, it is appropriate for a trial court to consider the skimpiness of the relief when adjusting the lodestar figure." *Coutin*, 124 F.3d at 339. This is precisely the method utilized by the courts below. The *Coutin* decision also recognizes that assessment of "results obtained" in a case can be made by reference to the plaintiff's success claim by claim, to the relief actually achieved, to the societal right vindicated in the litigation, or a combination of all three. In endorsing the latter approach, *id.* at 338, the First Circuit cites the Eleventh Circuit's decision in *Norman v. Housing Auth. of Montgomery*, 836 F.2d at 1302.

Decisions from many of the Circuit Courts of Appeal demonstrate the prevalence of the relief-oriented approach to evaluating lodestar reductions, even in lawsuits consisting of

single or "common core" claims. In *Spanish Action Comm. of Chicago v. City of Chicago*, 811 F.2d 1129 (7th Cir. 1987), for instance, in which the claims for relief involved a common core of facts, the Seventh Circuit justified lodestar reduction based on many of the same considerations in the decisions below: although the plaintiff received "substantial" compensatory damages, it failed to recover punitive damages, and its prayer for injunctive and declaratory relief was mooted by the city's entering into a consent decree in another action. Overall, therefore, the nature and scope of the relief obtained by the plaintiff was more limited than that sought. Similarly, in *Nephew v. City of Aurora*, 766 F.2d 1464 (10th Cir. 1985), the court held it was not an abuse of discretion to reduce an attorney's fee award where the plaintiff received nominal damages, his claim for punitive damages was unsuccessful, and the injunctive and declaratory relief he sought were unavailable after the dismissal of certain parties at the close of the plaintiff's case. *See also*, *Volk v. Gonzalez*, 262 F.3d 528 (5th Cir. 2001) (where significant injunctive relief awarded at trial reversed on appeal, and monetary relief nominal, lodestar reduced by 50%); *Sanders v. Brewer*, 972 F.2d 920, 923 (8th Cir. 1992) (attorney's fees reduced by 50% for plaintiff who obtained nominal damages but not his requested injunctive or declaratory relief; court noted fee compensation "should not be awarded on a claim-by-claim basis but rather on specific theories of relief."); *Zook v. Brown*, 865 F.2d 887 (7th Cir. 1989) (court evaluated limited declaratory relief obtained in reducing attorney's fees by 75%); *Culebras Ent. Corp. v. Rivera-Rios*, 846 F.2d 94, 102 (1st Cir. 1988) (while plaintiff achieved main objective of suit, making land marketable, but failed to obtain actual injunctive relief and damages requested, lodestar reduced by 50%; district court "much more familiar with the controversy and in a better position to assess plaintiffs' degree of success"); *Greater Los Angeles*

Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987) (in class action under Rehabilitation Act with common core of facts, plaintiffs obtained significant but limited results in light of original relief sought; attorney's fees reduced to 40% of lodestar amount).

In the foregoing cases, each court's assessment of "limited success," for purposes of lodestar reduction, was context-based and fact-specific, thus leading to the particular results. In each case, however, the court endorsed a relief-oriented approach identical to that of the Eleventh Circuit and the District Court in the decisions below. There exists no circuit conflict that warrants granting this Petition.

CONCLUSION

Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FRANK C. MORRIS, JR.
Counsel of Record
ANDREA R. CALEM
EPSTEIN BECKER & GREEN, P.C
1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 861-1880

Attorneys for Respondent
PaineWebber Incorporated